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# In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 526

UNITED STATES OF AMERICA, PETITIONER

*v.*

THE JOHN BARTH COMPANY AND UNITED STATES FIDELITY AND GUARANTY COMPANY

*ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES

### OPINIONS BELOW

The District Court for the Eastern District of Wisconsin rendered no opinion. The opinion of the Circuit Court of Appeals (R. 16) and the opinion of the same court on petition for rehearing (R. 20) are reported in 27 F. (2d) 782.

### JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 7, 1928. (R. 19.) Petition for rehearing was denied September 12, 1928. (R. 21.) Petition for certiorari was filed October 30, 1928. Certiorari was granted January 7, 1929. (R. 21.)

Jurisdiction is conferred upon this Court by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

### QUESTION PRESENTED

The question presented is whether an action on a bond given to stay the collection of a tax pending consideration of a claim for abatement is barred after expiration of the period of limitation prescribed by law on suits for collection of taxes.

### STATUTES INVOLVED

The relevant portions of the statutes involved are attached as an appendix.

### STATEMENT

On May 15, 1919, The John Barth Company filed its income and excess-profits taxes return for the calendar year 1918. (R. 11.) On June 25, 1919, the Commissioner of Internal Revenue assessed income and profits taxes against The John Barth Company for the year 1918 in the sum of $126,182.81, of which sum the company paid $74,764.40. (R. 1-2.)

On or about September 15, 1919, and on March 17, 1925, The John Barth Company duly filed claims for the abatement of such taxes in the sum of $39,501.58. (R. 2.)

On or about September 20, 1919, The John Barth Company as principal and the United States Fidelity and Guaranty Company as surety, in consideration of petitioner refraining from and sus-

pending the collection of the outstanding taxes for the year 1918, pending consideration and adjudication of the claims for abatement, executed and delivered a bond in the sum of $60,000. (R. 2.) The bond was as follows (R. 3–4):

> **Income and profits taxes—Bond under sections 214 (a) (12) and 234 (a) (14) of the revenue act of 1918.**
>
> Know all men by these presents that John Barth Company, of Milwaukee, Wisconsin, as principal, and United States Fidelity & Guaranty Company, of Baltimore, Maryland, as surety, are held and firmly bound unto the United States of America in the sum of sixty thousand and no/100 dollars, lawful money of the United States, for the payment whereof we bind ourselves, our heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents.
>
> Whereas, at the time of filing his return of income for the taxable year 1918 the above-bounden principal has filed or is about to file a claim in abatement based on the fact that he has sustained a substantial loss resulting from a material reduction (not due to temporary fluctuation) of the value of his inventory for such taxable year or from the actual payment after the close of such taxable year of rebates in pursuance of contracts entered into during such year upon sales made during such year; and
>
> Whereas, section 214 (a) (12) and 234 (a) (14) of the revenue act of 1918 provide that

in the case of such a claim payment of the amount of the tax covered thereby shall not be required until the claim is decided, but that the taxpayer shall accompany his claim with a bond in double the amount of the tax covered by the claim, with sureties satisfactory to the commissioner, conditioned for the payment of any part of such tax found to be due, with interest, and it appears that the amount of this bond is double that of the tax covered by such claim in abatement;

Now, therefore, the condition of the foregoing obligation is such that if the principal shall on notice and demand by the collector duly pay any part of such tax found by the commissioner to be due, with interest at the rate of twelve per cent per annum from the time such tax would have been due had no such claim been filed, and shall otherwise well and truly perform and observe all the provisions of law and the regulations, then this obligation is to be void, but otherwise to remain in full force and virtue.

Witness our hands and seals this 20th day of September, 1919.

(Signed) JOHN BARTH CO.,
By LOUIS SCHNEIDER, *Pres.*
UNITED STATES FIDELITY & GUARANTY CO.,
By R. K. BARTON, *Agt. Atty. in Fact.*

Signed, sealed, and delivered in the presence of—

JULIUS ZIEGLER.
R. C. MUELLER, Jr.

On March 25, 1926, the Commissioner of Internal Revenue passed upon the claims in abatement and rejected them in the sum of $29,842.32. (R. 2.) Notice of the rejection was given and demand for payment made upon both principal and surety. Such demand was refused. (R. 2–3.)

Thereafter, on September 22, 1926 (R. 1), the United States commenced this action against the principal and surety on the bond. Respondents demurred on the ground that the action was not commenced within the time limited by law as prescribed in the various Revenue Acts. The demurrer was sustained. (R. 5.)

From that decision petitioner prosecuted error to the Circuit Court of Appeals for the Seventh Circuit. (R. 6.) On November 4, 1927, the Circuit Court of Appeals certified two questions to this Court. (R. 11–14.) This Court dismissed the certificate (R. 14–15), 276 U. S. 606, and remanded the case to the Circuit Court of Appeals (R. 15–16), which affirmed the judgment of the District Court (R. 19). Rehearing was denied. (R. 21.) Petition for a writ of certiorari was granted by this Court. (R. 21.)

## SPECIFICATION OF ERRORS

The Circuit Court of Appeals erred:

1. In holding that the statutes limiting the time for the assessment of taxes and for commencing suits or proceedings for their collection applied to an action on a bond given to secure the payment

of any part of an assessment of taxes found to be due after determination of a claim for the abatement thereof.

2. In holding that the liability of defendants on the bond was extinguished by Section 1106 (a) of the Revenue Act of 1926, which provides that the statute of limitations in respect of internal-revenue taxes shall not only bar the remedy but shall also extinguish the liability.

## SUMMARY OF ARGUMENT

This is an action by the United States based upon the breach of a bond given by the taxpayer in consideration of the petitioner refraining from and suspending the collection of taxes which had been assessed and concerning which a claim in abatement had been filed. The United States is not bound by any statute of limitations unless that intention is clearly manifested and statutes of this character are to be strictly construed. The doctrine that where there are two remedies for the protection of a right, one may be barred and the other not, is established by the decisions of this Court.

The statutes relied upon by respondents place a limit only upon the time within which assessment may be made or a suit for the collection of taxes commenced. The assessment had already been made and the Commissioner's decision upon the claim in abatement is not the making of an assessment. This action is not a suit for the collection

of taxes but an action on contract upon the additional cause of action created by the bond. Accordingly the statutes relied upon by the respondents have no application.

The bond was conditioned for the payment of such tax as the Commissioner found to be due on consideration of the claim for abatement. No suit could be maintained on the bond until the abatement claim was decided, and there was no time limit on that decision.

Section 1106 (a) of the Revenue Act of 1926 is similarly without application to this proceeding. It merely extends the effect of the bar of the statutes of limitations and before it can apply it is necessary to point out an applicable statute of limitations. In any event Section 1106 (a) was retrospectively repealed by the Revenue Act of 1928, thereby depriving respondents of the defense of that section unless the repeal was beyond the competency of Congress, which we deny. It is settled that Congress has power to ratify and legalize the collection of an unauthorized tax and there is no substantial difference between the exercise of such power and the creation of a tax liability by a retroactive statute. Especially is this true when it is considered that the identical liability had theretofore existed and that the repeal imposed no unexpected burden which might have been avoided if the taxpayer had pursued a different course.

## ARGUMENT

### I

### THIS IS AN ACTION ON CONTRACT BASED UPON THE BREACH OF A BOND AND IS NOT A SUIT FOR THE COLLECTION OF TAXES WITHIN THE MEANING OF THE REVENUE ACTS

In view of the statements in the brief in opposition with respect to the issue involved in this case, an examination of the pleadings at the outset will clarify any doubt as to the nature of this action.

The bill of complaint alleges that on or about June 25, 1919, the Commissioner of Internal Revenue duly assessed income and profits taxes against The John Barth Company in the sum of $126,182.81 for the year 1918, of which sum The John Barth Company duly paid $74,764.40. (R. 1–2.) On or about September 15, 1919, and on March 17, 1925, claims were filed by The John Barth Company for the abatement of the tax so assessed in the sum of $39,501.58. On or about September 20, 1919, The John Barth Company, as principal, and the United States Fidelity and Guaranty Company, as surety, executed and delivered a bond in the sum of $60,000 in consideration of the petitioner refraining from and suspending the collection of the tax so assessed against The John Barth Company pending consideration of the said claims in abatement. (R. 2.) The bill further recites the rejection of the claims in abatement in the sum of $29,842.32 and the failure, neglect, and refusal of both The John Barth Company and the

United States Fidelity and Guaranty Company to fulfill the obligations of the said bond. (R. 2–3.) These facts must be taken to be true upon respondents' demurrer. Accordingly, this is an action by the United States based upon the breach of the bond.

The demurrer (R. 5) is based upon the plea "that the action was not commenced within the time limited by law which time is prescribed by sections 205d (250 (d)) of the revenue acts of 1918 and 1921, and sections 277a–2, 278d and 278e of the revenue act of 1924, and sections 277a–3, 278d, 278e and 1106a of the revenue act of 1926." Thus the question raised by the demurrer is whether the *action* is barred. Accordingly, it is clear that the statement contained in respondents' brief in opposition (p. 2–3), "The issue before this Court is not, therefore, what statutory period of limitation applies to actions upon such a bond as is here involved, but whether or not there has ever been a breach of the bond when no tax was determined or found to be due prior to the time when all tax liability became extinguished," is without force. Plainly, the only issue raised by the pleadings is whether this action is barred by the statutes of limitations set out in the demurrer.

A contention that the Commissioner's determination of the claim in abatement was barred after five years from the filing of the return finds no support in the statutes relied upon. They provide that an assessment must be made within five years. The

assessment in this case had been made before the bond was executed, well within the statutory period. Passing upon the claim in abatement is not the making of an assessment, and hence the period for the Commissioner's action was not limited by the statutes. The tax was already due when the bond was executed, and since it provided that the obligees should pay interest "from the time such tax would have been due had no such claim been filed" (R. 4), it is clear that the decision upon the claim in abatement related back to that time. The claim in abatement was allowed in the amount of nearly $10,000, and it should be clear that a statute of limitations *against the United States* is of no application to such a finding *in favor of the taxpayer*.

## II

### THE BAR OF THE STATUTE OF LIMITATIONS AGAINST ONE CAUSE OF ACTION DOES NOT REACH AN INDEPENDENT REMEDY

The sections of the statutes upon which respondents rely are statutes of limitations dealing with suits or proceedings for the collection of taxes. Those statutes do not purport to limit suits which are predicated upon the breach of a bond. The fact that the duty which the principal failed to perform was the payment of a tax does not make the action one for the collection of taxes. Compare *Metropolitan R. R. Co.* v. *District of Columbia*, 132 U. S. 1.

It is elementary that the United States is not bound by any statute of limitations unless that intention is clearly manifested, and it is well settled that statutes of this character are to be strictly construed. Whenever called upon to construe such a statute, this Court has consistently announced that rule. *United States* v. *Nashville, Etc., Ry. Co.*, 118 U. S. 120; *Northern Pac. Ry. Co.* v. *United States*, 227 U. S. 355; *Dupont de Nemours & Co.* v. *Davis*, 264 U. S. 456; *United States* v. *St. Paul, M. & M. Ry. Co.*, 247 U. S. 310; *Bowers* v. *New York & Albany Lighterage Co.*, 273 U. S. 346.

The Circuit Court of Appeals held that the question here involved is doubtful, but it failed to apply the rule of the above cases. To that extent, therefore, we submit that the decision below is in conflict with the decisions of this Court.

In conformity with that rule of strict construction the doctrine is laid down that, where there are several remedies open to a plaintiff, the fact that one remedy has become barred will not affect his right to any of the others which are not barred. A demonstration of this doctrine is to be found in those cases holding to the effect that a statute limiting the time for bringing a suit to annul land patents is of no application to an action to recover the value of such lands as damages for deceit practiced by the defendant in procuring the patent. *Southern Pac. R. R. Co.* v. *United States*, 200 U. S. 341; *United States* v. *Whited & Wheless*, 246 U. S. 552. In the latter case the Court said (p. 564):

> This doctrine, that where there are two remedies for the protection of a right one may be barred and the other not, is no novelty in the law. So long ago as 5 Pickering, in *Lamb* v. *Clark*, pp. 193, 198, it was tersely stated as then familiar doctrine that "If an injured party has a right to either of two actions, the one he chooses is not barred, because the other, if he had brought it, might have been." And the principle has frequently been recognized by this and other courts. *Lewis* v. *Hawkins*, 23 Wall. 119, 127; *Hardin* v. *Boyd*, 113 U. S. 756, 765; *Kirkman* v. *Philips' Heirs*, 7 Heisk. 222, 224; *Ivey's Administrator* v. *Owens*, 28 Alabama 641, 649; *Ganley* v. *Troy City National Bank*, 98 N. Y. 487, 494.

The same principle, applied in a different connection, is found in the decisions to the effect that money paid by mistake creates a separate cause of action for its recovery. *Wisconsin Central R'd* v. *United States*, 164 U. S. 190; *Grand Trunk Wn. Ry. Co.* v. *United States*, 252 U. S. 112. And a statute limiting the time for the collection of taxes has no application to a proceeding for the collection of money refunded by mistake. *Talcott* v. *United States*, 21 F. (2d) 493. In that case the plaintiff sought to recover Federal estate taxes and the United States filed a counterclaim for like taxes erroneously refunded. The court said (p. 494):

> In respect to limitations, the counterclaim is for money paid by mistake, to which the

> statutory limitations for collection of taxes have no application, to which is no limitation.

The case was affirmed by the Circuit Court of Appeals for the Ninth Circuit. (23 F. (2d) 897.) In the opinion it was held (p. 901):

> It is contended that recovery upon the defendant's counterclaim is barred by the statute of limitations, and reference is made to the Revenue Act of 1926, which provides that all revenue taxes, with certain exceptions, shall be assessed within four years after such taxes become due "and no proceedings in court without assessment for the collection of such taxes shall be begun after the expiration of five years after such taxes become due." But here the counterclaim is not a proceeding for the collection of taxes. It is a demand for the repayment to the government of moneys which had been illegally and by mistake paid by an officer of the United States.

This Court denied certiorari, 277 U. S. 604.

From these decisions we take it as well settled that where plaintiff has two remedies the bar of the statute against one will not affect the other.

As we read it, the opinion of the court below recognizes that an additional cause of action was created by the bond. The Circuit Court of Appeals nevertheless held that this additional remedy is subject to the same statutory bar as the original cause of action. We submit that this is entirely contrary to the well-settled doctrine established by the above cases.

## III

### THE RIGHT TO RECOVER UPON THE BREACH OF A BOND IS NOT AFFECTED BY THE STATUTES IN THE REVENUE ACTS LIMITING THE TIME WITHIN WHICH A SUIT FOR THE COLLECTION OF TAXES MUST BE BEGUN

The language of the sections relied on in the demurrer is that "no suit or proceeding for the collection of any such taxes shall be begun" after the expiration of the specified period. There is nothing in this language to indicate an intention to do more than bar the right to the recovery of taxes. To extend that language by implication beyond that single purpose would be to disregard the ruling founded upon a "great principle of public policy" laid down in the cases cited, *supra*, that the United States "are not bound by any statute of limitations, unless Congress has clearly manifested its intention that they should be so bound." *United States* v. *Nashville, Etc., Ry. Co.*, 118 U. S. 120, 125.

The singleness of purpose of the statute of limitations is indicated by the situation which called for a bond. The bond was given in pursuance of Section 234 (a) (14) of the Revenue Act of 1918. Upon a contemplation of the advantageous position of the Government at the time of posting the bond, the purpose sought to be accomplished becomes clear. The first purpose of the bond was one of advantage to the taxpayer—the postponement of collection of the tax pending the determination of the claim in abatement.

There being no time limit upon the Commissioner's study of the claim, it became necessary to safeguard the Government meanwhile. It was provided that upon the disallowance of any part of the claim the remainder of the tax due should be paid, with interest from the time the tax would have been due, had no such claim been filed. It was not intended that the Government should lose anything by the delay. It was provided that the bond should be conditioned upon the payment of any part of the tax found to be due. If for any reason the tax was not paid or could not be collected it must have been intended that the Government should have recourse to the bond and thus be restored to its original position. It was clearly the purpose so to protect the Government that when the claim in abatement was eventually decided the certainty of collection would not be impaired by the delay. There being already an enforceable cause of action against the taxpayer, collection could not be further secured unless a new cause of action were provided. Foreseeing that the ultimate collection from the taxpayer might be jeopardized by the delay, a bond was required which would permit the collection to be made from a different source. Thus Congress evinced a purpose of authorizing a stay of immediate collection only if adequate safeguards were provided to maintain the Government's present position.

In harmony with the intent of the statute the bond in the instant case was demanded and given.

The surety was a stranger to the claim for taxes. The tax had been assessed against The John Barth Company on account of net income received by it. When the assessment was made in 1919 the Government acquired the right of collection either by suit or distraint proceedings. This involved the right to collect the full amount of the tax only from The John Barth Company. The bond was given in consideration of the Government staying its hand and refraining from exercising the right of collection. The consideration moving to the Government was an entirely new cause of action, coupled with a new source of collection. By this contract the Government acquired no new right to collect the "tax" as such. Its power in that regard was already complete and ample. The principal and the surety are equally liable on the bond to the Government and the cause of action against each is necessarily identical. When measured by the Government's cause of action against the surety, it is apparent that it is not a right to collect taxes. It is a cause of action in lieu of and in addition to the collection of taxes. In exchange for the waiver of its present right of collection against a solvent debtor and to provide against a contingency, such as bankruptcy, or loss or destruction of the taxpayer's property, which might supervene to prevent collection of the tax, the United States obtained this right of action on contract against the principal and the corporate surety. If it be true that the Government in its new cause of action is now confronted with the same

limited statutory period provided for the collection of taxes, it can only be because such was the intent of Congress. To impute any such intent results in a finding that Congress, after having imposed the tax, bartered away a certainty of collection, granted to the taxpayer a means of postponing collection, and then provided a statutory period which might ultimately operate to defeat the collection. It is submitted that such a result was never contemplated by Congress, much less deliberately intended and specifically authorized.

The statutes relied upon by the respondents place a limit only upon the time within which the United States may commence a proceeding for the collection of taxes. If, as the Government contends, this is not a suit for the collection of taxes, then those statutes necessarily have no application to this case.

The precise question here involved has been before several of the courts and there has been a diversity of opinion. The District Court for the Northern District of California on October 21, 1927, in *United States* v. *American Photo Player Co. and Maryland Casualty Co.* (unreported), and the District Court for the Southern District of California on September 13, 1927, in *United States* v. *Good Springs Anchor Co. and Fidelity & Deposit Co. of Maryland* (unreported), decided that the statute of limitations applicable to suits for taxes was a bar to an action on a bond. No opinion was rendered in either of those cases.

However, in *United States* v. *Onken Bros. Co.*, 23 F. (2d) 367, the District Court for the District of Wyoming held that the action on the bond was not barred by the statute of limitations applicable to suits for taxes. The opinion contains the following (pp. 367–368):

> Under their demurrer, which challenges the petition on the ground that the petition fails to state facts sufficient to constitute a cause of action, the point is raised that the cause of action is barred by the statute of limitations, as fixed by section 250 (d), Revenue Act of 1921 (chapter 136, 42 Stats. 227–265), which provides that no suit or proceeding for the collection of any tax shall be begun after the expiration of five years after the date when the return was filed.
>
> Defendants chiefly rely upon the construction of that statute as laid down in the case of *Bowers* v. *New York & Albany Co.*, 273 U. S. 346, which holds that the statute applies alike to a suit in court or to a proceeding by distraint after the lapse of the five-year period. Were this a suit on the part of the government to collect the tax, or were it a proceeding to enforce collection by distraint, that case would undoubtedly be controlling. This is a suit upon a bond given to the plaintiff for the purpose of suspending further action or proceeding for the collection of the tax until the claim for abatement could be passed upon.
>
> In the opinion of this court the bond is a separate and distinct agreement, represent-

ing voluntary action on the part of the government and the defendant against whom the tax was sought to be collected, which superseded and took the place of their rights and privileges under the revenue law limitation. Under that law the government, after the first assessment of the tax, could have sought collection by court procedure or by distraint. If it did not do so for a period of five years after the return was filed, the defendant was entitled to assert his rights guaranteed him by the statute of limitations. Through the promise and agreement represented by the bond, the rights of the parties under the revenue law were postponed and incorporated in the bond, which straightforwardly on its face insures the payment of the tax which may be subsequently determined in a consideration of the claim for abatement, and without mention of the time when such determination should be made. Under such a situation, the only limitation to apply would be the limitation governing suits upon bonds of this character, which is not the point involved here.

The same question was involved in a case recently before the Circuit Court of Appeals for the Fifth Circuit, *Gray Motor Co.* v. *United States*, 16 F. (2d) 367. That was an action by the United States upon an abatement bond executed by the Motor Company and two individual sureties. The bond was given for the same purpose as the bond in the instant case, and the action was brought upon failure of the Motor Company to pay the amount of the tax found

due after the rejection of the claim in abatement. The Motor Company and the sureties filed answers in which they denied that any tax was due, pleaded the statute of limitations in bar to the action, and set up certain fraudulent acts of the manager of the Motor Company by which the company had lost money, so that in fact no profit was earned for the taxable year in question. The District Court sustained demurrers to that part of the answer setting up the statute of limitations and the fraudulent acts of the manager, and judgment was entered for the United States. Error was assigned to the sustaining of the demurrers, to the exclusion of evidence to sustain the allegations of the answer demurred to, and to the entering of the final judgment. By reason of the facts disclosed in the case the Circuit Court of Appeals did not find it necessary as a matter of law to pass upon the question of the statute of limitations. However, the following language from the opinion discloses that the court entertained no doubt that defenses appropriate to a suit for the collection of taxes were not available in a suit on an abatement bond (p. 368):

> Extended discussion and citation of authority are unnecessary to sustain the ruling of the District Court. The suit was on a bond, the condition of which had been clearly breached. By giving bond the company postponed payment of the amount admitted to be due by the return and secured immunity from distraint of its assets. To contest the amount of tax found to be due by the Com-

missioner in this proceeding would be to permit a collateral attack upon the assessment, something not countenanced by the law. If the company desired to dispute the assessment, the way was open by paying the tax and taking the proper steps to recover it back.

*United States* v. *Rennolds* (S. D. N. Y.), 27 F. (2d) 902, was a suit on a bond given in order to suspend the collection of income taxes pending the determination of a claim in abatement. The defendant contended that the suit was barred by the statutes of limitations and that the tax was extinguished by Section 1106 (a) of the Revenue Act of 1926. This contention was rejected by the court in the following language (pp. 902–903):

> The liability of the surety must be construed upon the instrument executed by it. The tax was found due, the claim for abatement was denied, and the taxpayer failed to pay what he owed the government. These facts show breach of the condition of the bond. There is no part of such condition necessary to attachment of liability nonexistent. True it is that the statute has since by limitation extinguished the tax, but it is not apparent that this fact should also extinguish the liability upon the bond.
>
> The government was in the act of collecting from its debtor by due process of law a debt legally due and owing. At the request of the debtor it suspended its legal action in consideration of the surety's undertaking to indemnify it. That undertaking

created a new liability, governed by a different statute of limitations. The government had thereafter two remedies—one against the taxpayer, to collect the tax by legal procedure; the other against the taxpayer and the surety upon the bond, given to cause the government to desist action to recover the tax, to collect the penalty provided therein, if the condition should be broken. It saw fit not to pursue the first, relying solely upon the second. The condition having been broken, the surety's liability attaches, irrespective of any effect of the statute of limitations upon the coexistent other right of action.

Had the condition of the bond contained the express provision that failure of the government to collect from the taxpayer within the statutory period would relieve the surety, a different situation would exist. But to read into the bond such provision would be to alter the express covenants of a sealed instrument. Could it be contended that, if C should undertake in writing to A that he (C) would pay A for all merchandise sold on open account to B, and A thereafter should sell B such merchandise, but fail to collect from B within a five-year statutory limitation upon open accounts, he could not recover from C upon the latter's written contract within a ten-year statutory limitation period? The negative answer is obvious. The government here had the right to collect the tax by distraint, and for the surrender of that right it properly insisted, as a price

therefor, upon a general promise to pay such amount as might be found due, either before or after the statutory limitation period had expired.

*McCaughn* v. *Philadelphia Barge Co.* (E. D. Pa.), 27 F. (2d) 628, involved a suit on a similar bond. The contention that the tax was barred and the liability on the bond extinguished was again rejected, the court saying (p. 629):

> It is agreed that the taxpayer's return for the year 1918 (upon which the additional assessment was made) was filed April 29, 1919. It is also conceded by the Government that if no bond had been given no proceeding for the collection of the additional tax could have been brought after April 29, 1924, by reason of the limitation contained in the Revenue Act of 1918 (40 Stat. 1057). The question here for decision, therefore, is whether, after the expiration of the statutory period allowed for proceedings to collect a tax, a suit can be maintained upon a bond given before the statute had run by the taxpayer and a surety in connection with the filing of a claim for abatement.
>
> The defendant's principal contention is based upon section 1106 (a) of the Revenue Act of 1926, which reads in part as follows: "The bar of the statute of limitations against the United States in respect of any internal revenue tax shall not only operate to bar the remedy but shall extinguish the liability. * * * " (26 U. S. C. A., Sec. 1249 (a).)

He says that, since this section of the Revenue Act operates wholly to extinguish the liability of the principal debtor, therefore no cause of action can exist against the surety.

It must be admitted that his argument appears at first to have considerable force. But, on further consideration, it becomes apparent that the liability referred to in this section must mean the liability for taxes imposed by the revenue law. This liability is the subject matter of the statute. It does not arise from any voluntary act of the taxpayer but is created by the mere will of the sovereign expressed in legislation. Before the bond was executed it was the only obligation upon the taxpayer and if the taxpayer were not a party to the bond I would agree with the contention of the defendant.

However, as soon as the bond was executed, the taxpayer assumed a second and entirely distinct obligation, and became subject to a new and entirely different kind of liability. There was a surety, but the taxpayer was the party primarily bound. The new liability was voluntary and contractual. It was in form a direct and primary obligation, not to pay a tax, but to pay the sum of $12,635, defeasible only upon payment by the taxpayer of a certain amount, to be fixed by subsequent action of the Commissioner. No limitation was put upon the time within which the Commissioner was required to act in fixing such sum. Inasmuch as the collector had the right to proceed immediately

> for the collection of the tax, it follows that he also had the right to require, as the price of forbearance from such action, a general promise to pay such amount as might be found due at any time, either before or after the expiration of the statutory period. This was unquestionably the intent and understanding of the parties. The taxpayer's promise is under seal, and in addition is based upon ample consideration. If the collector had proceeded by distraint, as he had the right to do, the taxpayer's only course would have been to pay the tax and then to have sued for a recovery of the money. The giving of the bond and the withholding of proceedings relieved him of that necessity.

The same principle was recognized by the Circuit Court of Appeals for the Fourth Circuit in *United States* v. *United States Fidelity & Guaranty Co.*, 221 Fed. 27. That was a suit against the surety on a distiller's bond in which the defense was set up, among others, that the suit was barred by the statute of limitations provided in Section 1047, Revised Statutes. In disposing of that defense the court said (p. 29):

> In the first place, we are of opinion that the action is not barred by any statute of limitations. The defendant cites and apparently relies upon section 1047 of the Revised Statutes, which reads as follows:
>
> "No suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States, shall be

> maintained, except in cases where it is otherwise specially provided, unless the same is commenced within five years from the time when the penalty or forfeiture accrued."
>
> But this suit is brought upon the bond of a surety, and not to recover a statutory penalty or forfeiture, and it seems clear to us that the section quoted has no application.

A similar holding with respect to the application of Section 1047, Revised Statutes, is found in the opinion in *Raymond* v. *United States*, Fed. Cas. 11596, which involved a suit on a paymaster's bond. The court said (20 Fed. Cas. 337):

> The last plea is, that the action did not accrue to the plaintiff within five years next before the commencement of the suit. No statute limiting the right of action upon a bond to five years has been referred to. The 4th section of the act of February 28, 1839 (5 Stat. 322), which now forms section 1047 of the Revised Statutes, is relied upon. That section provides, that "no suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States," shall be maintained, unless commenced within five years from the time when the penalty or forfeiture accrued. This relates to penalties and forfeitures incurred by infractions of the law, and applies as well to suits as to other forms of prosecution therefor; but a civil action upon a bond grows out of contract, whether it be in favor of the United States or of a private person. A penal sum, named in a bond, is not a pen-

alty, within the statute, and it does not accrue under the laws of the United States but under the contract of the party.

The doctrine governing these cases is that the right of the Government to sue for the breach of the bond is not dependent upon, but exists independently and in addition to, the right to sue for the collection of taxes. Upon a consideration of the cases above cited, it is clear that the statutes limiting the time for commencing a suit to collect taxes can have no application to this proceeding.

We submit that these cases present the better view. The cardinal rule of construction applicable to statutes generally, that effect is to be given to the intent of Congress, is applied with equal force when interpreting statutes of limitations. *United States* v. *Noveck*, 271 U. S. 201; *United States* v. *McElvain*, 272 U. S. 633. The statute of limitations is not such a meritorious defense that either the law or the facts should be strained in aid of it. *Harrington* v. *Anderson*, 23 Colo. App. 415.

The cause of action accrued upon the breach of the condition of the bond. It could not arise until the Commissioner had passed on the claim for abatement and determined the amount due and after refusal on the part of the principal to pay the tax. Having availed itself of the benefits of the contract, The John Barth Company can not now avoid its obligation. By taking advantage of the statute the taxpayer was offered an opportunity to postpone the payment of the tax, and it was obviously

the purpose of the Government in requiring the bond to provide against any contingency that might arise to prevent it from collecting the tax as such. Compare *United States Fidelity & Guaranty Co.* v. *United States*, 220 Fed. 592.

This Court has said in *Bowers* v. *New York & Albany Lighterage Co., supra*, that the statutes of limitations against the United States, provided in the Revenue Acts, were "in pursuance of a legislative purpose to require more prompt action upon the part of the commissioner and collectors" (p. 350). Upon such a view of the matter it is clear that this proceeding, which grows out of a method devised by Congress to protect the United States from the delay occasioned by the taxpayer's claim in abatement, is not barred by statutes which were designed to protect the taxpayer from the delays of the Government.

Furthermore, the principal and surety by the terms of the bond contracted to pay the amount determined to be due, and to make that payment *when* the Commissioner made the determination and gave notice of the amount.

The condition of the bond is—

> if the principal shall on notice and demand by the collector duly pay any part of such tax *found by the commissioner to be due*. (Italics ours.)

There was no time limit fixed by law for decision on the claim for abatement, and passing on such a claim is not the making of an assessment.

We have then a contract to pay the amount ultimately determined to be due, when the determination is made, regardless of statutes of limitations on assessments or suits to collect taxes, the benefits of which were waived by the obligors on the bond.

It is conceded that the tax was imposed by the Revenue Act of 1918, and the question is whether the claim of the United States has become barred by its statute of limitations. Such a question in the event of ambiguity or uncertainty should be resolved in favor of the United States. *Bowers* v. *New York & Albany Lighterage Co.*, 273 U. S. 346, 349; *United States* v. *St. Paul, M. & M. Ry. Co.*, 247 U. S. 310; *In re McClure Co.*, 21 F. (2d) 538, 540.

Furthermore, it will be noted that the taxpayer filed a second claim in abatement on March 17, 1925. (R. 2.) This was more than five years after the filing of the return on May 15, 1919 (R. 11), and is inconsistent with respondents' present contention that the Commissioner was then without power to determine the tax. It is an illuminating exposition of the understanding of the parties to the contract and is in harmony with our contention that no limit as to time was placed upon the Commissioner in deciding the taxpayer's claim in abatement. This second claim in abatement necessarily prolonged the Commissioner's determination of the taxpayer's liability and contributed to the postponement of the Commissioner's decision until March 25, 1926 (R. 2), and the filing of this

action until September 22, 1926 (R. 1). Furthermore, the abatement claims were in the amount of $39,501.58, and they were rejected in the sum of $29,842.32 (R. 2), so that the Commissioner's action on March 25, 1926, which respondents now claim to be unauthorized, has actually reduced the tax to the extent of nearly $10,000. It results that by giving the bond in this case The John Barth Company postponed the payment of its tax and secured a reduction of its liability. By its second claim in abatement it further contributed to the delay, so that this action was not filed until after the enactment of the Revenue Act of 1926.

Respondents contend, and the Circuit Court of Appeals held, that Section 1106 (a) of that Act extinguished all liability of the taxpayer. We submit, however, that Section 1106 (a) is not controlling here, for two reasons. In the first place, we contend that when properly construed that section never had any application to this case. In the second place, the repeal of that section by Section 612 of the Revenue Act of 1928 has eliminated it as a defense. While the Circuit Court of Appeals, upon rehearing, held that the repeal was invalid, we submit that it was within the competency of Congress.

In support of our contention that Section 1106 (a) never had any application to this case, attention is called to its language. It provides:

> The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only

> operate to bar the remedy but shall extinguish the liability; but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax. The bar of the statute of limitations against the taxpayer in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no collection in respect of such tax shall be made unless the taxpayer has underpaid the tax.

This can only mean that in any suit for the collection of taxes, if it shall appear that the tax has been collected after the statute of limitations has run, then the plaintiff taxpayer may be given relief, even though he could not, as plaintiff, plead the statute of limitations, which has been described as a shield and not a sword. That this is the true purpose of the section is clearly apparent from the legislative history, which shows that the language was added as an amendment to the section after the decision of the Court of Claims in the case of *Toraway Mills* v. *United States*, 61 Ct. Cls. 363. (Cong. Rec., Vol. 67, Part 4, pp. 3531, 4401, 4409, 4410, 4419.)

In *Bowers* v. *New York & Albany Lighterage Co.*, 273 U. S. 346, 350, this Court said of a limitation provision:

> The provision is to be applied in harmony with the intention reasonably to be inferred from its terms and the circumstances of its enactment.

It is clear from the circumstances of its enactment that the intention reasonably to be inferred from its terms does not permit the application of Section 1106 (a) of the Revenue Act of 1926 to the instant case.

The statement made upon the presentation of the amendment in the Senate is as follows:

> Mr. REED of Pennsylvania. These are offered as committee amendments.
>
> The VICE PRESIDENT. The clerk will read the amendment.
>
> The CHIEF CLERK. On page 289, after line 18, insert:
>
> "SEC. 1106. (a) The bar of the statute of limitations against the United States and against the taxpayer in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability."
>
> Mr. REED of Pennsylvania. Mr. President, just a word in explanation of this amendment. The necessity for it arises from a very peculiar case. In a recent decision in the Court of Claims it has been held, in substance, that after the statute of limitations has run against the collection of a tax, the collector may nevertheless issue his distraint and collect the tax by a distraint, and then if the taxpayer brings suit against the United States to recover it back, he, being the plaintiff, can not plead the statute of limitations, although the United States would have been barred from a suit for the tax because the statute had run. It is a preposterous result,

> it seems to me, and a very great hardship to the taxpayer, to allow such a condition to continue, and while I feel reasonably confident, with all respect to the Court of Claims, that that case will be reversed on appeal, I do not think we ought to allow even a possibility that it will not remain, and we ought to correct it now.

The explanation of the amendment in the statement of the House Conferees (Congressional Document No. 8531, House Report No. 356, p. 55) is as follows:

> Amendment No. 170: This amendment provides that the bar of the statute of limitations against the United States and against the taxpayer shall operate to bar the remedy and also extinguish the liability. This amendment is deemed advisable because of an opinion in a recent decision of the Court of Claims (*Toxaway Mills* v. *U. S.*), although in a case presenting the specific point this opinion very probably would not be followed by the Supreme Court (see Taft, C. J., in *Graham* v. *du Pont*, 262 U. S. 234, 256, 258). The House recedes with an amendment making certain that the provision does not require a refund to a taxpayer for any year (even though the statute has run against the Government) unless he had in fact overpaid his tax for that year, nor require a taxpayer to pay an additional tax for any year (even though the statute has run against his claim or suit for refund) unless he had in fact underpaid his tax for that year. Ob-

viously, this section does not apply in the case of fraud or in the case of a waiver.

The value of congressional debates to establsh the purpose of legislation was recognized by this Court in *Work* v. *Braffet*, 276 U. S. 560, 566.

We submit that the operation of Section 1106 (a) depends entirely upon the application of some other statute of limitations. Unless there is a case involved where the statute of limitations operates as a bar, Section 1106 (a) does not apply. It follows the bar of the statute and does not operate independently. It is of no wider scope than the statute of limitations and must stand or fall with it. The section does not provide that after five years from the date of the filing of an income-tax return relating to the year 1918 the tax is automatically wiped out. On the contrary, it provides that "the bar of the statute of limitations against the United States • • • shall extinguish the liability." That language merely extends the effect of the bar of the statute of limitations, but the section does not cover a field where no statute of limitations is applicable. It is our contention that no statute of limitations is made applicable to a suit by the United States in contract to recover upon the breach of a bond. If that is true, then it is evident that Section 1106 (a) is without application here.

We are urging that the application of a statute limiting the time within which the United States is required to act to a situation where the United States is under obligation not to act is so incon-

sistent that it must be deemed to have been the purpose of Congress that the statute should be suspended while the hand of the United States was stayed. The inconsistency was so obvious that Congress finally wrote into the statutes a declaration that under such circumstances the running of the statute of limitations shall be considered to be suspended. Section 283 (l) of the Revenue Act of 1926 provides:

> In the case of any income, war-profits, or excess-profits tax imposed by prior Act of Congress, in computing the period of limitations provided in section 277 or 278 of this Act on the making of assessments and the beginning of distraint or a proceeding in court, the running of the statute of limitations shall be considered to have been suspended (in addition to the period of suspension provided for in subdivision (b) of section 277) for any period prior to the enactment of this Act during which the Commissioner was prohibited from making the assessment or beginning distraint or proceeding in court.

The purpose of the provision is shown by the following excerpt from the Conference Report on the Revenue Bill of 1926 (Congressional Document No. 8531, House Report 356, p. 48):

> (6) *Suspension of statute of limitations before passage of new bill.*—Section 277 (b) of the bill as agreed to in conference provides for the suspension of the running of the statute of limitations on assessments and col-

> lections during the time when the hands of the commissioner are tied, not only in the cases of taxes imposed by this title, but also (by reason of the provisions of section 283) in the cases of taxes under prior acts, whether a deficiency letter under the 1924 act has been sent out or not. Subdivision (l) of section 283, added by the Senate amendment, provides that in addition to the period of suspension already provided for, the running of the statute shall be considered to have been suspended for any period prior to the enactment of this act during which the commissioner's hands were tied.
>
> The House recedes with an amendment making a clerical change and making a minor clarifying amendment.

There may be some question whether or not Section 283 (l) applies to this case, but it is at least declaratory of the broad purpose of Congress that when a taxpayer is afforded a means of delaying the collection of taxes he must, when availing himself of the privilege, waive the statute of limitations against the United States. Unless the taxpayer in this case understood that the statute of limitations did not apply to the Commissioner's decision upon the claim in abatement, there is no explanation for the filing of a second claim in abatement on March 17, 1925, after the expiration of five years from the date of the filing of the return.

A further inconsistency would result if, after the express declaration in Section 283 (l) that the statute of limitations was suspended during the

period while the Commissioner's hand was stayed, it should be held that Section 1106 (a) of the same statute must be interpreted to extinguish the liability and prevent the collecion of the tax *qua* tax, as well as the recovery of the United States upon the bond.

The Congressional purpose is further demonstrated by a consideration of Sections 607 and 611 of the Revenue Act of 1928. Section 607 provides for the recovery of taxes assessed or paid after the expiration of the appropriate period of limitations. However, Section 611 provides that if a claim in abatement was filed with or without a bond and the collection stayed, then the defense of the statute of limitations is withdrawn in so far as it affects collections actually made after the prescribed period. We think this is a confirmation of our contention that Congress never intended to apply the statute of limitations in cases where the taxpayer contributed to the delay in collection by filing a claim in abatement. It thus appears that if the tax in the present case had been paid in response to the demand of the Collector after the rejection of the claim in abatement, no credit or refund could be made to the taxpayer. This is entirely consistent with our contention that in this case where the tax has not been paid the defense of the statute of limitations is likewise unavailable to a taxpayer who has contributed to the delay by the filing of a claim in abatement. We submit that Section 234 (a) (14) of the Revenue Act of 1918 providing for this

bond created a situation so inconsistent with the statute of limitations that it was the evident purpose of Congress that the claim in abatement and the posting of the bond should virtually amount to a waiver of the benefits of such statutes. We think the provisions of the Revenue Act of 1928, just discussed, demonstrate that to be true. In withdrawing the defense of the statute of limitations in the case of the taxpayer who has actually paid his tax Congress was endeavoring to be consistent and avoid discrimination between those taxpayers who had contributed to the delay but not paid taxes. Since those who had not paid were liable to a suit upon the bond without any limitation as to time, it was appropriate that the defense of the statute of limitations should be withdrawn in those cases where the tax was paid and an attempt subsequently made to recover it. The later legislation is declaratory of the true construction and meaning of the earlier Acts. *Bailey* v. *Clark*, 21 Wall. 284, 288.

Considering the intent of Congress and its purpose to postpone immediate collection of the tax only when the United States was protected by a contract giving rise to an additional cause of action with a new source of collection, the conclusion is inevitable that this suit is an action in contract, based upon the breach of the bond given to insure the United States from all contingencies which might prevent the collection of the taxes directly, and that it can not be barred by a statute limiting the time for a different kind of action.

But whatever effect might otherwise have been given to Section 1106 (a), it is submitted that it can have no present application, for the reason that it was repealed as of the date of its enactment by Section 612 of the Revenue Act of 1928 (Act of May 29, 1928, c. 852, 45 Stat. 791, 875), which reads:

> *Repeal of Section 1106 (a) of 1926 Act.*—Section 1106 (a) of the Revenue Act of 1926 is repealed as of February 26, 1926.

The evident purpose and object of that statute was to restore conditions to the exact status which they would have occupied had Section 1106 (a) of the 1926 Act never been enacted. It therefore appears that the plain language of the Revenue Act of 1928 deprives respondents of the defense of Section 1106 (a) of the 1926 Act, and hence the decision of the court below rested upon a statute which had already been repealed. "Of course it does not matter that these cases had gone to a higher Court. When the root is cut the branches fall." *Smallwood* v. *Gallardo*, 275 U. S. 56, 62. See also *Rafferty* v. *Smith, Bell & Co.*, 257 U. S. 226, 232.

On petition for rehearing the Circuit Court of Appeals held that it was not within the power of Congress to enact legislation to recreate the liability extinguished by Section 1106 (a). Heretofore in this brief we have contended that Section 1106 (a) had no application to this case because the statutes of limitations upon which it depended did not bar this action. But, assuming the con-

trary to be true, it is submitted that the repeal of Section 1106 (a) was within the competency of Congress.

In denying that power to Congress the Circuit Court of Appeals relied upon the decision of this Court in *William Danzer Co.* v. *Gulf R. R.*, 268 U. S. 633. That case dealt not with taxes, but with a statute limiting the time for filing claims for damages against a railroad.

The decision turned upon the principle that the provision limiting the time within which suits must be brought constituted a part of the definition of the cause of action, and that time having elapsed a later statute could not be construed retroactively to create liability. We submit that the instant case is grounded upon very different principles, for the need of the Government for revenue has frequently been decreed a sufficient justification for making a tax measure retroactive. *Stockdale* v. *Insurance Companies*, 20 Wall. 323, 332; *Seattle* v. *Kelleher*, 195 U. S. 351, 359; *Wagner* v. *Baltimore*, 239 U. S. 207, 216; *Billings* v. *United States*, 232 U. S. 261, 282; *Florida Central, Etc., R'd Co.* v. *Reynolds*, 183 U. S. 471.

It was pressed upon this Court in *Charlotte Harbor Ry.* v. *Welles*, 260 U. S. 8, that there was a distinction between a curative statute and a creative statute. Upon that point it was said (pp. 11–12):

> * * * The argument in support of the distinction is ingenious and attractive, but we are not disposed to review it in detail.
>
> The general and established proposition is that, what the legislature could have authorized, it can ratify if it can authorize at the time of ratification. *United States* v. *Heinszen & Co.*, 206 U. S. 370; *Wagner* v. *Baltimore*, 239 U. S. 207; *Stockdale* v. *Insurance Companies*, 20 Wall. 323. And the power is necessary, that government may not be defeated by omissions or inaccuracies in the exercise of functions necessary to its administration.

It being settled that Congress has the power to ratify and legalize the collection of an unauthorized tax, we submit that there is no substantial difference between the exercise of such a power and the creation of a tax liability by a retroactive statute. Particularly is this true when it is considered that in the instant case the identical liability had theretofore existed and that the repeal of Section 1106 (a) imposed no "unexpected liability that if known might have induced those concerned to avoid it and to use their money in other ways." *Lewellyn* v. *Frick*, 268 U. S. 238, 252.

Furthermore, the rule that private rights, which have been vested, can not be taken away by subsequent legislation does not apply when public rights are involved. That is clear from the decision of this Court in *Hodges* v. *Snyder*, 261 U. S. 600, 603–604:

It is true that, as they contend, the private rights of parties which have been vested by the judgment of a court can not be taken away by subsequent legislation, but must be thereafter enforced by the court regardless of such legislation. *Pennsylvania* v. *Wheeling Bridge Co.*, 18 How. 421, 429; *The Clinton Bridge*, 10 Wall. 454, 463; *United States* v. *Klein*, 13 Wall. 128, 146; *McCullough* v. *Virginia*, 172 U. S. 102, 124 (in which the repealing act was passed after judgment by the trial court).

This rule, however, as held in the *Wheeling Bridge Case*, does not apply to a suit brought for the enforcement of a public right, which, even after it has been established by the judgment of the court, may be annulled by subsequent legislation and should not be thereafter enforced; although, in so far as a private right has been incidentally established by such judgment, as for special damages to the plaintiff or for his costs, it may not be thus taken away. *Pennsylvania* v. *Wheeling Bridge Co.*, *supra.*, pp. 431, 439. This case has been cited with approval in *The Clinton Bridge*, *supra*, p. 463 (likewise involving a public, as distinguished from a private, right of action), *United States* v. *Klein*, *supra*, p. 146; *Stockdale* v. *Insurance Companies*, *supra*, p. 332; and *Mills* v. *Green*, *supra*, p. 655. And so a judgment for the restitution of taxes collected under the ostensible authority of a general statute will be reversed when, after the rendition of such judgment, a statute has been passed legaliz-

> ing and ratifying such taxation. *Rafferty* v. *Smith, Bell & Co., supra*, p. 232.

In the light of those cases it can not be said that no right exists to retroactively create a tax liability. *A fortiori* it can not be said that no right exists to repeal retroactively a statute which extinguishes a liability for taxes, and we accordingly submit that the *Danzer case* is not controlling.

Assuming that Section 1106 (a) ever applied to this case, the ultimate question is whether it conferred any vested right. The principles of taxation are not those of contract, *Seattle* v. *Kelleher, supra*, p. 359. We submit that no man has a vested right not to pay a tax which he really owes (*In re McClure Co.*, 21 F. (2d) 538, 540), and therefore that Section 1106 (a) conferred no vested right. This is analogous to the principle announced by this Court in *Smallwood* v. *Gallardo, supra* (p. 61):

> * * * There is no vested right to an injunction against collecting illegal taxes and bringing these bills did not create one.

In that case suits were brought in the District Court of the United States for Porto Rico to restrain the collection of taxes imposed by the laws of Porto Rico. At that time there was no prohibition against such suits, but a later Act of Congress having provided that no such suit should be maintained, this Court ordered that the cases be sent back with directions to dismiss for want of jurisdiction.

It is submitted, further, that the decision of this Court in *United States* v. *Heinszen & Co.*, 206 U. S. 370, is apposite. That was a suit to recover the amount of tariff duties exacted in the Philippine Islands on merchandise brought from the United States, the duties having been collected under the authority of the President after ratification of the treaty but before the time when Congress had enacted tariff duties for the Philippine Islands. It appeared that a later Act of Congress had legalized and ratified the duties, but it was urged that the ratifying statute was invalid in that it deprived claimants of a vested right of property in the money paid to discharge the illegally enacted duties. With respect to that contention, this Court said (pp. 386–387):

> But if it be conceded that the claim to a return of the moneys paid in discharge of the exacted duties was in a sense a vested right, it in principle, as we have already observed, would be but the character of right referred to by Kent in his Commentaries, where, in treating of the validity of statutes retroactively operating on certain classes of rights, it is said (Vol. 2, pp. 415, 416):
>
> "The legal rights affected in those cases by the statutes were deemed to have been vested subject to the equity existing against them, and which the statutes recognized and enforced. *Goshen* v. *Stonington*, 4 Connecticut, 209; *Wilkinson* v. *Leland*, 2 Peters, 627; *Langdon* v. *Strong*, 2 Vermont, 234; *Watson*

> *v. Mercer*, 8 Peters, 88; 3 Story's Comm. on the Constitution, 267."
>
> Nor does the mere fact that at the time the ratifying statute was enacted this action was pending for the recovery of the sums paid cause the statute to be repugnant to the Constitution. The mere commencement of the suit did not change the nature of the right. Hence again if it be conceded that the capacity to prosecute the pending suit to judgment was in a sense a vested right, certainly also the power of the United States to ratify was, to say the least, a right of as high a character. To arrogate to themselves the authority to divest the right of the United States to ratify is then in reason the assumption upon which the asserted right of the claimants to recover must rest.

This is a question of constitutional power, but no just mind need shrink from giving full effect to the statute on the ground that it is repugnant to the spirit of our institutions or the principles of natural justice. The tax was justly due from The John Barth Company, and to the extent it is not satisfied the burden is shifted to others. Therefore, if it be determined that respondents acquired any right from Section 1106 (a) of the Revenue Act of 1926, we submit that the right must be deemed to have been vested subject to the equities existing against it which the 1928 Act recognized and enforced. The presumption repeatedly indulged in favor of the validity of an Act of Congress is particularly strong when considering a Revenue Act. *Nicol* v. *Ames*, 173 U. S. 509.